

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PAUL C. BOLIN, ) Case No. C.V. F-99-5279-REC  
Petitioner, ) DEATH PENALTY CASE  
vs. )  
Steven W. Ornoski, As Acting ) ORDER FOLLOWING FIRST PHASE III  
Warden of San Quentin ) CASE MANAGEMENT CONFERENCE  
State Prison, ) DATE: January 18, 2006  
Respondent. ) TIME: 8:30 a.m.  
 ) COURTROOM ONE

This matter came on for a Case Management Conference ("CMC") in the above-entitled Court, on January 18, 2006 at 8:30 a.m., the Honorable Robert E. Coyle presiding. Petitioner Paul C. Bolin ("Bolin") was represented by Assistant Federal Defender Allison Claire and private attorney Robert D. Bacon. Respondent Steven W. Ornoski, As Acting Warden of San Quentin State Prison (the "Warden") was represented by Stephanie A. Mitchell.<sup>1</sup> All counsel appeared telephonically.

<sup>1</sup> Ms. Mitchell reports that lead counsel for the Warden, Deputy Attorney General, Rachelle A. Newcomb, is currently on leave, but will be returning to the case March 1, 2006.

1 **I. Introduction.**

2 The purpose of the CMC was to establish a schedule for tasks to  
3 be accomplished in Phase III of the litigation and obtain more input  
4 about Bolin's proposed budget and case management plan. The hearing  
5 was conducted in two parts. The first included counsel for both  
6 parties discussing with the Court tasks to be performed and  
7 anticipated briefing schedules. The second part was conducted ex  
8 parte with only counsel for Bolin present discussing with the Court  
9 specific confidential matters relative to Bolin's proposed Phase III  
10 budget and case management plan. Under 21 U.S.C. § 848(q)(9), ex  
11 parte consideration of budgeting and funding matters requires a  
12 petitioner to make a showing of the need for confidentiality. The  
13 Court finds that since budget applications require disclosure of  
14 matters protected by the attorney-client and/or work product  
15 privileges, the need for confidentiality is inherent in the budgeting  
16 process. The ex parte proceedings for the present hearing have been  
17 reported and any memorialization of those proceedings will be  
18 maintained under seal. An order summarizing the ex parte proceedings  
19 and approving Bolin's Phase III budget and case management plan is  
20 filed under seal concurrently herewith.

21 **II. Overview of Phase III.**

22 As stated to the parties in the Court's September 30, 2005 Order  
23 (doc. 142), Phase III of capital habeas litigation involves merits  
24 briefing, requests for factual development, some factual development  
25 (usually in the form of document production discovery), and the  
26 Court's decision as to whether to grant an evidentiary hearing. Phase  
27 III will culminate with the issuance of an Order resolving Bolin's  
28 anticipated request for an evidentiary hearing.

1 Briefing the entire petition, by both parties, is a crucial  
2 element of the Court's management of the case during Phase III. Legal  
3 briefing frames the issues beyond the parties' allegations and will  
4 be referred to when the Court reviews Bolin's anticipated request for  
5 an evidentiary hearing as well as the Warden's response.

6 While preliminary fact development and briefing are the primary  
7 activities anticipated for Phase III, the Court encourages the parties  
8 to consider settlement, mediation, or other alternative dispute  
9 resolution procedures. Bolin's counsel has requested budget approval  
10 for professional time to pursue such efforts and the time has been  
11 approved. The Court will provide any assistance in this regard which  
12 the parties may request.

13 **III. Merits Briefing and Discovery in Phase III.**

14 Bolin expresses considerable concern that he cannot  
15 comprehensively brief the claims in the Amended Petition until factual  
16 development, including an evidentiary hearing, is complete. The Court  
17 does not understand the logic of this statement as it applies to  
18 Bolin's anticipated request for an evidentiary hearing. Before the  
19 Court can even consider whether to grant an evidentiary hearing,  
20 Bolin's litigation team must brief the claims for which the hearing  
21 is requested. If claims for which an evidentiary hearing is requested  
22 can be briefed, the Court does not comprehend why counsel cannot also  
23 brief record-based claims.

24 When this matter was discussed during the CMC, the Court  
25 categorically foreclosed the possibility of Bolin completing factual  
26 development prior to briefing the merits of the Amended Petition.  
27 That pronouncement referred to the requested *completion* of factual  
28 development, as in conducting extensive discovery and an evidentiary

1 hearing, prior to merits briefing. It did not foreclose limited pre-  
2 briefing discovery. Indeed, the Court noted at the hearing that since  
3 Bolin's fully exhausted Amended Petition is on file, discovery is  
4 permitted. Thus, the Court would be amenable to considering pre-  
5 merits briefing discovery requests under Rule 6 of the Rules Governing  
6 § 2254 Cases, as permitted by Ninth Circuit authority. See *Calderon*  
7 *v. United States District Court (Nicolaus)*, 98 F.3d 1102, 1106 (9th  
8 Cir. 1996); *Calderon v. United States District Court (Roberts)*, 113  
9 F.3d 149, 149 (9th Cir. 1997). If Bolin's litigation team wishes to  
10 conduct some fact development discovery prior to filing his memorandum  
11 of points and authorities in support of the Amended Petition,  
12 discovery may be requested by way of noticed motion.

13 Bolin is cautioned, however, that discovery in habeas actions,  
14 unlike discovery in regular civil actions, requires "good cause" as  
15 specified in Rule 6 of the Rules Governing § 2254 Cases. In that  
16 context, good cause has two primary elements. The first is that the  
17 material sought is not available by informal means. The second  
18 relates to a strict construction of relevance. That is, discoverable  
19 information in habeas proceedings requires a closer nexus of proof to  
20 alleged claims than is required in regular civil actions.  
21 Specifically, for specified discovery to be authorized, Bolin must  
22 make a showing of entitlement to relief if he is able to obtain the  
23 discovery requested. See *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir.  
24 1997) (discovery is appropriate to permit petitioner to establish  
25 entitlement to relief); *Harris v. Nelson*, 397 U.S. 286, 300 (1969)  
26 (discovery is available to petitioner, who upon specific allegations,  
27 convinces the court s/he may be entitled to relief if the facts were  
28 developed). Because of the nature of habeas corpus, the expansive

1 construction of relevance in civil cases, to embrace all information  
2 "reasonably calculated to lead to the discovery of admissible  
3 evidence" specified in the Federal Rule of Civil Procedure 26(b)(1),  
4 is not appropriate. Habeas corpus is not a proceeding to *learn* facts.  
5 *See, e.g., Harris*, 394 U.S. at 297 ("broad-ranging preliminary inquiry  
6 is neither necessary nor appropriate in the context of a habeas corpus  
7 proceeding); *Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999)  
8 (habeas corpus "was never meant to be a fishing expedition for habeas  
9 petitioners to 'explore their case in search of its existence'"). At  
10 the CMC, Bolin's counsel commented about obtaining discovery of  
11 information that would lead to discovery of admissible evidence. The  
12 foregoing exposition of controlling authority demonstrates that  
13 Bolin's perception of his entitlement to discovery must be  
14 significantly narrowed. With that admonition in mind, Bolin may take  
15 appropriate steps to obtain discovery, including discovery in advance  
16 of merits briefing.

#### 17 **IV. Topics Related to Merits Briefing.**

18 To clarify the Court's intentions with respect to management of  
19 this case, three related topics must be addressed. The first involves  
20 the anticipated evidentiary hearing motion. The second involves  
21 motions for summary judgment. The third involves oral argument.

##### 22 **A. Anticipated Motion for Evidentiary Hearing.**

23 Bolin's request for an evidentiary hearing will be addressed  
24 *after* legal briefing is submitted on the merits of all claims in the  
25 Amended Petition. As set out in the Attorney Guide for the Fresno  
26 Division of the Eastern District of California, a request for an  
27 evidentiary hearing is a limited document. Because full legal  
28 briefing will already have been completed, in the evidentiary hearing

1 motion, Bolin will have only to identify each claim for which an  
2 evidentiary hearing is sought, provide an offer of proof for the  
3 evidence anticipated at the evidentiary hearing,<sup>2</sup> and explain briefly  
4 why the evidence sought was not developed in state proceedings. While  
5 the Court does not minimize the effort which must go into setting  
6 forth an offer of proof, the factual development in the preparation  
7 of an evidentiary hearing motion need not be complete. That is the  
8 purpose of the evidentiary hearing.

9 Nor should Bolin be concerned that the Court may deny one or more  
10 record-based claims on the merits before determining the propriety of  
11 an evidentiary hearing. The Court is well-aware of its obligation to  
12 assess cumulative prejudice as to interrelated record-based claims and  
13 claims for which an evidentiary hearing has been granted. In other  
14 cases, the Court has been known to hold in reserve its decision on  
15 record-based claims, *sua sponte*, until after an evidentiary hearing  
16 has been conducted. Should there be any overriding concern on this  
17 issue, Bolin is at liberty to request the Court to reserve ruling on  
18 a record-based claim until after an evidentiary hearing is determined  
19 appropriate, and if granted, conducted.

20 **B. Motions for Summary Judgment.**

21 The Attorney Guide for the Fresno Division provides no  
22 opportunity for either party to file a motion for summary judgment.  
23 In this Court summary judgment motions have been found unnecessary,  
24 because unlike regular civil proceedings, there is *no trial* in habeas  
25 cases that can be avoided by summary judgment. The determination of

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26  
27 <sup>2</sup> The offer of proof may consist of witness and/ or expert  
28 declarations or a statement by Bolin's counsel. Counter offers of  
proof by the Warden likewise may consist of witness and/ or expert  
declarations or a statement by the Warden's counsel.

1 whether a petitioner is entitled to relief is made based on the papers  
2 and after an evidentiary hearing, if granted. With respect to  
3 procedural issues in particular, the Warden has been directed to raise  
4 all procedural issues as affirmative defenses in his Answer to the  
5 Amended Petition. This has been accomplished. Bolin may address any  
6 of those procedural defenses in his opening memorandum of points and  
7 authorities in support of his Amended Petition, and the Warden will  
8 certainly address procedural defenses in his points and authorities  
9 in opposition to the Amended Petition. Bolin will have the final  
10 opportunity to respond to the Warden's defenses in his reply brief.  
11 With respect to substantive issues, summary judgment would simply be  
12 duplicative of merits briefing.

13 **C. Oral Argument.**

14 Both parties should be advised that the Court rarely entertains  
15 oral argument on motions presented. While the Court will not  
16 foreclose the possibility of oral argument on potential discovery  
17 motions or the anticipated motion for an evidentiary hearing, the  
18 Court can categorically state that there will be no oral argument on  
19 a summary judgment or a procedural motion, since neither of these  
20 types of motions will be permitted. Further, unless there is  
21 something extremely unusual about any potential discovery motion, the  
22 Court will receive oral argument, if any, telephonically. Live oral  
23 argument on the anticipated motion for evidentiary hearing, if any,  
24 will likely be limited to specific narrowly circumscribed issues.

25 **V. Briefing and Post-Briefing Schedule.**

26 The parties agreed on a 330 schedule at the CMC hearing. Within  
27 120 days of entry of this order, Bolin will file his opening  
28 memorandum of points and authorities in support of the Amended

Petition. Bolin may, in this opening brief, address any of the Warden's procedural defenses alleged in his Answer.<sup>3</sup> Following the filing of Bolin's brief, the Warden will have 120 days within which to file his opposition points and authorities. Within 60 days from the filing of the Warden's opposition brief, Bolin will file his reply brief. Bolin will then schedule a second Phase III CMC to be conducted within 30 days of the filing of his reply brief

**VI. Anticipated Duration of Phase III.**

Phase III comprises of a substantial effort by both parties. Significant briefing and preparation is required to request discovery, brief the merits, meet opposing arguments, and litigate Bolin's entitlement to an evidentiary hearing. Based on the briefing schedule already agreed to by the parties, as well as the Court's past experience with Phase III litigation in other cases, the duration of Phase III in this case is anticipated to be three years.<sup>4</sup>

**VII. Conclusion.**

The case management plan for Phase III of this case is established, and subject to modification only on a showing of good cause.

IT IS SO ORDERED.

Dated: January 27, 2006

/s/Robert E. Coyle  
Robert E. Coyle  
United States District Judge

<sup>3</sup> Bolin may also wait to address procedural defenses in his reply brief if he prefers.

<sup>4</sup> Bolin's counsel had anticipated the duration of Phase III to be two years, but in light of all that must be accomplished, the Court believes this estimate is too conservative.